

ORIGINAL

IN THE COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO

LOUIS SELKIRK
5507 Sterling Lakes Circle Apt. 102
Mason, Ohio 45040
Plaintiff,

v.

DUKE ENERGY/ DUKE ENERGY,
OHIO, Inc.
139 East Fourth Street
P.O. Box 960
Cincinnati, Ohio 45202

and

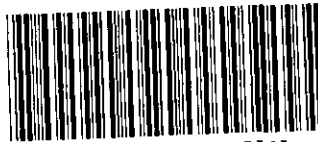
JAY GOLSCH, Substation Maintenance:
and Construction Supervisor for Duke
Energy
139 East Fourth Street
Cincinnati, Ohio 45202

Defendants

CASE NO.: A 1 1 0 8 8 6 0

JUDGE:

COMPLAINT FOR UNLAWFUL
DISCRIMINATORY PRACTICES



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NATURE OF THE ACTION

Now comes the Plaintiff, Louis T. Selkirk, by and through the undersigned counsel, and brings his action against Defendants, Duke Energy/ Duke Energy Ohio, Inc., (hereinafter "Defendant Duke"), Jay Golsch, independently, and in his representative capacity as Substation Maintenance and Construction Supervisor for Duke Energy (hereinafter "Defendant Golsch"), as a result of his wrongful termination from Duke Energy as result of racial discrimination.

Plaintiff Selkirk, an African American male, employed as Senior Electrician was subjected to an unlawful termination through a disparately applied weight requirement instituted by Defendant Duke after having worked for Defendant Duke for 19 years prior to his termination in November 11, 2005.

Plaintiff Selkirk had worked his way up through the ranks of Duke and had achieved a high level of seniority in his department as a Senior Substation Electrician. Prior to the

institution of the “weight requirement” Plaintiff Selkirk had an exemplary work record with no blemishes and was regarded as a valuable employee.

In addition to Plaintiff Selkirk, as a result of the institution of a formal weight requirement for his job, there were other similarly situated employees¹ that struggled to maintain the weight requirement that were afforded options and concessions to maintain their employment, however, only Plaintiff Selkirk who was able to effectively do his job and his duties didn’t suffer or change as a result of his weight, was terminated as a result of his inability to maintain the required weight.

Three years after being terminated, having suffered irreparable harm, the company was forced to rehire Plaintiff Selkirk as part of an arbitration agreement.² However, Plaintiff Selkirk was not made whole, received no back pay, no compensation for his pain and suffering nor any compensation for their wrongful conduct.

Although in 2007 Defendant Duke was instructed to rehire Plaintiff Selkirk at a position of comparable compensation within 1 year, based upon the Defendants’ desire to punish Plaintiff Selkirk, he was turned down for every position he applied for. Defendant Duke required him to take a battery of tests to “qualify” for positions that were well within and even below his qualifications despite his 19 years of previous service with the company. Each position Plaintiff Selkirk applied for was either removed or he somehow didn’t qualify for. It wasn’t July 2008, almost a year to the date of the expiration of time that Defendant Duke offered Plaintiff Selkirk a position, ironically, the same position he had applied for nine months previously and was told he did not qualify for, a position making over ten dollars (\$10.00) an hour less than what he was making when he was terminated three (3) years prior.

Plaintiff Selkirk firmly believes that each and every action taken against him throughout this process was a result of the Defendants’ racial biases and discriminatory practice and that

¹ Caucasian male, substation electrician Mike McQuery, who because of his excessive weight was unable to effectively do his job was permitted to sit at the district and maintain his employment until he retired after Plaintiff Selkirk was terminated.

² July 2007, Arbitration Award, attached hereto as Exhibit A.

the weight requirement, was disparately applied to Plaintiff Selkirk was pretext as a cover to get rid of Plaintiff Selkirk in order to allow the promotion of other Caucasian employees in his department that had less seniority in his stead.

Plaintiff Selkirk seeks to recover actual, compensatory, liquidated, and punitive damages for racial discrimination. Plaintiff Selkirk submits a request to the court for lost salary and benefits, future lost salary and benefits, compensatory damages for emotional pain and suffering and punitive damages

PARTIES

1. Plaintiff Louis T. Selkirk is a citizen and resident of the State of Ohio and was employed by Defendants in Hamilton County, Ohio.

2. Defendant Duke Energy is a foreign corporation doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.

3. Defendant Duke Energy, Ohio, Inc. is an Ohio corporation located in, residing in, and doing business in Hamilton County, Ohio. Defendant is an employer within the meaning of state law.

4. Upon information and belief at all times relevant hereto Defendant Jay Golsch was an employee of Defendants Duke Energy/ Duke Energy, Ohio, Inc. employed in the capacity of Substation Maintenance and Construction Supervisor.

NATURE OF CAUSE OF ACTION

5. Plaintiff Selkirk began working for Cinergy in 1986, the predecessor company of Defendant Duke. During the 19 years prior to his unlawful termination, Plaintiff Selkirk had worked his way up through the ranks and had obtained the position of Senior Construction Electrician with Duke at the time of his termination.

6. Throughout Plaintiff Selkirk's then nineteen year tenure at Duke, Plaintiff Selkirk was an exemplary employee with a good work record with no disciplinary concerns of record and was regarded as a dedicated and loyal employee.

7. In February 2000, Defendant Duke instituted a formal weight requirement and weight maintenance policy that required employees to maintain a specified weight determined by the safety equipment they were required to use for their job for their department.

8. Each department supervisor determined the maximum body weight the employees had to maintain. As a result of the department supervisor, at the time, Defendant Golsch, Plaintiff Selkirk was required to maintain a body weight of 285 pounds.

9. At the time Plaintiff Selkirk was initially hired in 1986 he weighed 262.

10. At the time that Duke initiated the weight restrictions there were several Duke employees that had difficulty maintaining the strict weight requirements and those employees were accommodated in various ways.

11. Some departments chose to utilize the heavier capacity safety harnesses and ladders in order to avoid any potential safety hazards associated with the weight overload.

12. Plaintiff Selkirk requested that he be allowed to utilize the heavier capacity equipment and was denied accommodations.

13. Some employees who struggled with the weight restrictions were provided assistance through surgical intervention (Gastric by-pass) in order to maintain control their weight. When Plaintiff Selkirk requested the surgical intervention after having consulted his physician and attempted other less drastic means, he was denied the surgery being told that the insurance would only cover "special cases" and he did not qualify for it.

14. Another employee Mike McQuery, a Caucasian male employee within the same department as Plaintiff Selkirk, holding the same position as Senior Substation Electrician also struggled with maintaining his weight.

15. Mike McQuery had significant impairment in his work performance as a result of his weight such that he could not physically walk to his truck from the parking lot without having to physically stop to take a break, however he was permitted to sit at the "district" and continue his employment, without a demotion with accommodations for three years until he retired.

16. During that same time period, Plaintiff Selkirk was administratively placed on restricted duties that in fact did not change his actual work load or responsibilities and although his work did not change or suffer, he was not permitted the option to maintain his employment and was in fact the only person terminated.

17. In a 2001 Plaintiff Selkirk immediate supervisors, now retired Dan Marks and Defendant Golsch informed him that he would be provided with several options other than termination as a result of his inability to maintain the weight requirement and stated that his failure to meet the requirements would result in either a demotion to job he would be qualified for, transfer to another job in which he was qualified for if available and termination in the absence of either of the two options.

18. However, the transfer and/or demotion option was never considered and none of Defendant Duke's managers even discussed the options with him.

19. From on or about 2001 until 2005 when Plaintiff Selkirk was unlawfully terminated, although he was frequently harassed by the constant weigh ins beyond what the policy required, Plaintiff Selkirk continued to work and produce great work, participated in no misconduct and vigorously tried to comply with the weight requirements by following the established procedures meeting with the nutritionist and his physician and participating successfully in the step program.

20. Although, Defendant Duke would maintain that Plaintiff Selkirk had to be terminated due to his non compliance, despite his stellar work and performance, Defendant Golsch had a specific discriminatory intent with regards to Plaintiff Selkirk.

21. In fact, Defendant Golsch who was the foreman at the time and then supervisor of Plaintiff Selkirk was heard referring to the plaintiff as "that nigger" as he tore up Plaintiff Selkirk's tool box.

22. Defendant Duke promoted Defendant Golsch to his current position as Substation Maintenance and Construction Supervisor, taking over for Defendant Issack's position when Selkirk was terminated.

23. In fact, the termination of Plaintiff Selkirk allowed Mike Forest, who just happened to be Jay Golsch's brother-in-law, to be promoted to Supervisor a position that Plaintiff Selkirk would have been the likely candidate as he had more seniority and expertise than Mike Forest.

24. Further, not only did the firing of Plaintiff Selkirk make room for the necessary promotion of other Caucasian male employees within his department with less seniority, Defendant Duke was permitted to do so at a substantial savings.

25. After a brutal two year battle of fighting his termination through Duke's grievance process initiated by the IBEW loc. 134 union, it was determined that Plaintiff Selkirk should not have been terminated and Duke was told to reinstate him and was given one year to comply.³

26. However, the reinstatement would not compensate Plaintiff Selkirk or make him whole for the then two year prior gap and loss in employment.

27. As a result of the wrongful termination, Plaintiff Selkirk lost his income, lost his home rendering him and his family homeless and caused the eventual demise of his marriage.

28. It was during 2006 while Plaintiff Selkirk was actively seeking employment, still fighting his termination that he was being considered for a position with Progress Energy. Progress Energy was on the verge of offering Mr. Selkirk a position and had flown him down to Florida as a result. However, said negotiations were halted and Plaintiff Selkirk was suddenly not being considered after contacting Duke Energy to verify his employment history.

29. It is upon information and belief that Progress Energy was told that Plaintiff Selkirk never worked for Duke and to not consider him for the position.

30. On or about July 2007 Defendant Duke was ordered to offer Plaintiff Selkirk the opportunity to fill a vacant position for which he was qualified that was either comparable to the

³ See Arbitration Award, attached hereto as Exhibit A.

his former position in terms of pay and compensation, or a position that was less comparable and he was provided the option to accept the “transfer” or reject it until August 2008.⁴

31. From on or about August 2007 through August 2008 Plaintiff Selkirk applied for at least 10 positions with Defendant Duke and was required to take the Customer Contact test, “Manual Practice Test Battery and Technical Test Battery.”⁵

32. Although Plaintiff Selkirk passed each test, and was granted approximately five interviews, Plaintiff Selkirk was not offered any of the positions.

33. In fact all of the jobs he applied for and interviewed for, he was not offered the position or was told the position had been removed.⁶

34. While seeking active employment with Duke and having no success, Plaintiff Selkirk applied for positions outside of Duke, all to no avail. In fact he put in for a position at Cisco Foods as a driver, however they were unable to hire him due to information the company received from Duke indicating that he never worked for them.

35. On or about July 2008 Plaintiff Selkirk was offered the position of a Material Specialist C, after having been told in January or February 2008 that he didn’t qualify for the same job.

36. Upon rehire to the Material Specialist C position, he was offered a salary of \$16.50 per hour, nearly \$10.00 less an hour than what he was making in 2005 when he was wrongfully terminated.

37. Since his rehire, Plaintiff Selkirk has remained a loyal employee, working hard and since accepting the lower level position in 2008 he applied for and accepted a promotion to a driver position.

38. However since returning to Duke in 2008, despite the promotion to Driver, his work performance has been more scrutinized than the other workers in his department. He is not

⁴ See Exhibit A Pages 15 and 16.

⁵ Each position that he applied for required a specific test and even if he passed it before Plaintiff Selkirk was required to retake for a different position

⁶ See Letter from HR Staffing Services dated January 3, 2008 Performance Tech position, position cancelled to repos a lower level – Asst. Performance Tech position, attached hereto as Exhibit B. See also, letter deciding to pursue other candidates for the laboratory helper position and job qualifications attached hereto as Exhibit C.

permitted to engage in even casual conversations with coworkers during work, unlike his Caucasian counterparts.

39. Plaintiff Selkirk was harshly reprimanded and received letters and write ups during operator training unjustly and has experienced an entirely different tolerance level and held to a much rigorous standard than his contemporaries.⁷

40. Since his reinstatement, Plaintiff Selkirk has not received a formal evaluation and has not been treated equally with regards to receiving over time consideration.

COUNT I
(Unlawful Discriminatory Practices (Racial Discrimination) – O.R.C. § 4112.02 A)

42. Plaintiff Selkirk incorporates paragraphs 1-41 as if fully rewritten herein.

43. Plaintiff Selkirk at all times relevant herein was an African American employee, employed through Defendant Duke.

44. Defendants Duke and Golsch independently and in his representative capacity as Foreman and now Supervisor for the Substation Maintenance and Construction Department for Defendant Duke engaged in racial discrimination against Plaintiff Selkirk.

45. Defendants Duke and Golsch independently and in his representative capacity as Foreman and now Supervisor for the Substation Maintenance and Construction Department for Defendant Duke was able to control and negatively impact Plaintiff Selkirk through the application of the weight restriction policy in a disparate way.

46. Defendants Duke and Golsch independently and in his representative capacity as Foreman and now Supervisor for the Substation Maintenance and Construction Department for Defendant Duke denied Plaintiff Selkirk access to services and accommodations to assist with his weight control whereas other similarly situated Caucasian employees were afforded said access and services.

⁷ Plaintiff Selkirk received a write up during training because when he was operating a truck he inadvertently hit a card reader, just knocking off the cover and not causing any damage as cover was able to be replaced back on. However, Jamie Hieland was operating the electric boom and negligently snapped two poles and took out the electric in an entire building as did not receive as harsh a response as his incident.

47. Defendants Duke and Golsch independently and in his representative capacity as Foreman and now Supervisor for the Substation Maintenance and Construction Department for Defendant Duke did not provide Plaintiff Selkirk the option of transferring or demotion to avoid being terminated from his position, when similarly situated Caucasian employees were permitted to do so.

48. Defendants Duke and Golsch independently and in his representative capacity as Foreman and now Supervisor for the Substation Maintenance and Construction Department for Defendant Duke unlawfully terminated Plaintiff Selkirk unlawfully and without just cause.

49. Defendants Duke permitted individual departments the discretion as to the application of the weight requirements without monitoring the overall application of the requirements to all employees to prevent individual supervisors the opportunity to single out and discriminate against specific employees setting the stage for the racial discrimination.

50. Defendant Golsch made disparaging racial remarks referring to "that nigger" concerning Plaintiff Selkirk and unlawfully destroyed his tool box in the presence of two Caucasian employees and as a result of his position and authority, was able to use the weight program as pretext to get rid of Plaintiff Selkirk and promote his brother-in-law in the position that Plaintiff Selkirk would have been able to get had he not been terminated as Plaintiff Selkirk had greater experience, expertise and seniority.

51. As a direct and proximate result of the unlawful independent and joint discriminatory actions and practices of the Defendants Duke and Golsch, Plaintiff Selkirk was terminated from his position at Duke for a period of three years and lost approximately \$158,000.00 in salary for the three years of back pay he would have earned during the period of termination.

COUNT II

52. Plaintiff Selkirk incorporates paragraphs 1-51 as if fully rewritten herein.

53. During the time of termination, Plaintiff Selkirk sought employment with Progress Electric, Florida Power and Light and Daytona Beach Power companies. Each of the companies where excited about Plaintiff Selkirk and the prospects of employment looked well.

54. Defendants Duke engaged in unlawful business practices by intentionally and directly providing negative and false references concerning Plaintiff Selkirk's employment with Defendant Duke.

55. As a direct and proximate result of outrageous and egregious conduct of Duke in providing the negligent and false information, Plaintiff Selkirk was denied the opportunity not only to work for Duke but was blocked and intentionally hindered from his being able to be hired with other power and electric companies.

56. As a direct and proximate result of Plaintiff Selkirk's inability to obtain gain employment through the intentional and wrongful conduct of the Defendants. Plaintiff Selkirk and his family was rendered literally homeless and lost everything and was forced to live and sleep in his car.

57. AS a direct and proximate result of the Defendants outrageous and egregious conduct, Plaintiff Selkirk suffered irreparable harm in an amount yet to be determined.

COUNT III
(Intentional Infliction of Emotional Distress)

58. Plaintiff Selkirk incorporates paragraphs 1-57 as if fully rewritten herein.

59. As a direct and proximate result of the unlawful independent and joint discriminatory actions and practices of the Defendants Duke and Golsch and as a direct and proximate result of outrageous and egregious conduct of Duke, Plaintiff Selkirk, Plaintiff Selkirk suffered losses over and above that of income and benefits.

60. As a direct and proximate result of the unlawful independent and joint discriminatory actions and practices of the Defendants Duke and Golsch and as a direct and proximate result of outrageous and egregious conduct of Duke, Plaintiff Selkirk, Plaintiff Selkirk when Plaintiff Selkirk lost his income and as was literally and physically homeless with his wife and children,

Plaintiff Selkirk suffered irreparable emotional distress damages and harm in an amount yet to be determined.

COUNT IV
(Unlawful Discriminatory Practices (Retaliation) – O.R.C. § 4112.02 J)

61. Plaintiff Selkirk incorporates paragraphs 1-60 as if fully rewritten herein.

62. As a direct and proximate result of the unlawful termination that Defendants Duke and Golsch had engaged in, Plaintiff Selkirk challenged his termination.

63. From November 2005 until July 2007, Plaintiff Selkirk engaged in a long arduous grievance process through the union at Duke.

64. As a direct and proximate result of challenging his unlawful termination, the arbitrator determined that the termination was unlawful and Defendant Duke was order to reinstate Plaintiff Selkirk.

65. However, as a result of this process, Defendant Duke engaged in unlawful delay by denying him legitimate opportunities to obtain a position with the company that was comparable to prior to his termination.

66. Defendant Duke engaged in unlawful conduct by subjecting Plaintiff Selkirk to unnecessary steps and processes, without any legitimate intention on holding up their end of the responsibilities.

67. As a result of their intended retaliatory actions, Defendant Duke only offered Plaintiff Selkirk a position making \$10.00 less an hour than what he had made previously, intentionally frustrating him in the process.

68. And even then the \$10.00 less per hour position was only offered after a year of denials of the same position and equally qualified position and continued blocking him from obtaining outside employment.

69. Since returning, as a direct and proximate result of his successfully challenging his original termination and their forced reinstatement, Defendant Duke through its agents and

representatives have engaged in unlawful harsh scrutiny, disparate treatment and overall maltreatment.

70. As a direct and proximate result of the retaliatory scheme that the Defendants engaged in, Plaintiff Selkirk suffered the loss of decreased earning for 2008, 2009, 2010 and 2011 of the \$10.00 an hour which is approximately \$83,200.00.

71. As a direct and proximate result of the retaliatory scheme that the Defendants engaged in Plaintiff Selkirk suffered the increase in wages that he would have been entitled to as all of the employees he was working with in 2005 are making more approximately \$10.00 more an hour. As a result Plaintiff Selkirk suffered the loss of increase in wages for 2008, 2009, 2010 and 2011 of an additional \$10.00 an hour which is approximately \$83,200.00

72. Therefore as a direct and proximate result of their retaliatory scheme, Plaintiff Selkirk lost approximately \$166,400.00 in earnings and salary decreased losses.

COUNT V
(Punitive Damages)

73. Plaintiff Selkirk incorporates paragraphs 1-721 as if fully rewritten herein.

74. The aforementioned actions of the Defendants were willful, wanton, malicious and oppressive, and were undertaken with the intent with reckless disregard for the rights of Plaintiff Selkirk and justify the awarding of exemplary and punitive damages in an amount yet to be determined.

WHEREFORE, Plaintiff Louis T. Selkirk prays judgment against Defendants Defendants, Duke Energy/ Duke Energy Ohio, Inc., (hereinafter "Defendant Duke"), Jay Golsch, independently, and in his representative capacity as Substation Maintenance and Construction Supervisor for Duke Energy jointly and severally, and respectfully requests that this Court grant the following:

A. Compensatory damages for back pay in the amount of \$156,000.00;

- B. Compensatory damages associated with the \$166,400.00 in earnings and salary decreased losses;
- C. Compensatory damages for the discriminatory conduct,
- D. Compensatory damages for the intentional interference with prospective employment losses
- E. Compensatory damages associated with Plaintiff Selkirk's emotional distress;
- F. Compensatory damages for retaliatory conduct;
- G. Punitive damages;
- H. Reasonable costs and attorneys' fees; and
- I. Any and all other relief as this Court deems just and equitable.

Respectfully submitted,



Mary T. Foster (0081729)
Foster Law, LLC
260 Northland Blvd., Suite 229
Cincinnati, Ohio 45246
(513) 326-5366 Telephone
(513) 326-5367 Facsimile
mtfoster@fosterlawllc.com

INSTRUCTIONS TO THE CLERK

Please serve the Defendants by certified mail at the addresses in the caption.



Mary T. Foster (0081729)

MITCHELL B. GOLDBERG

Arbitrator and Mediator

Northern Ohio Office
253 East Aurora Road
Northfield Center, OH 44067
Ph. 330-468-5303
Ex. 330-468-5443
Email: mgoldlaw@alltel.net

Southern Ohio Office
125 Springfield Pike
Cincinnati, OH 45215
Ph. 513-761-2777
Ex. 513-761-3238

ARBITRATOR'S BILL

CASE NO.: FMCS 07-51749-8
CASE NAME: Duke Energy Corp. and IBEW Loc. 134
GRIEVANCE: Selkirk
PARTIES:

Raymond Neusch, Esq., for the Employer
Jerry A. Spicer, Esq., for the Union

ARBITRATOR'S COMPENSATION:

Number of Hearing Days: 1 @ \$950 per day.....\$950.00
Study and Preparation Days: 3 @ \$950 per day.....\$2,850.00
Travel and Review of Pre-Hearing Materials:
Hearing Date(s) April 26, 2007
Cancellation/Postponement Fee:
Other:

FEES: \$3,800.00

ARBITRATOR'S EXPENSES:

Transportation:
Meals: \$9.35
Hotel: \$115.99
Copying: \$8.00
Parking: \$8.00
Postage/Delivery: \$5.46
Tolls:
Fax charges:
Secretarial services:
Other:

EXPENSES: \$146.80

TOTAL: \$3,946.80

PAYABLE BY THE UNION/ASSOCIATION/FEDERATION: \$1,973.40
PAYABLE BY THE EMPLOYER: \$1,973.40

Arbitrator Signature Mitchell B. Goldberg
Tax I.D. No. 34-1786940 (C.W. Designs, Inc.)

Date: July 13, 2007



I. Introduction and Background.

The parties selected the undersigned as the arbitrator of this grievance pursuant to Article II, Section 2 of their collective bargaining agreement ("CBA"). That section refers to a three-person arbitration board; however, it is this arbitrator's understanding that he is the sole arbitrator for this dispute.

Louis Selkirk ("Grievant"), a Senior Construction Electrician in the Substation Construction Department, filed a grievance on November 16, 2005 alleging that he was unjustly terminated from his employment because of his failure to comply with the 285-pound maximum body weight requirement imposed by his department. The Grievant and the Union request that the Grievant be reinstated to his employment, and that he recover his lost seniority, pay and benefits.

The Employer denied the grievance throughout each step, and the matter proceeded to binding arbitration at the Employer's offices on April 26, 2007. The parties presented sworn testimonial evidence and submitted documentary exhibits. Witnesses were examined and cross-examined. A reporter transcribed the proceedings as the official record. Post-hearing briefs were submitted after all of the evidence was received.

The parties stipulated that all procedural and substantive requirements of the grievance procedure and CBA were met, and that the issue is properly before the arbitrator for a final and binding decision.

II. Facts.

The parties do not dispute the factual history regarding the Employer's issuance and administration of a formal weight requirement and weight maintenance program on February 14, 2000. The disputed issue involves the application of the requirement to the Grievant, and the Employer's decision to discharge the Grievant for his failure to maintain his weight in compliance with the requirement. The Employer's reasons for implementing a weight requirement are explained in its February 14th Safety Bulletin:

Employees of the Energy Delivery Business Unit rely on tools, equipment and vehicles to gain access to various work areas, such as ladders, aerial lifts and platforms. These types of devices are manufactured to meet ANSI standards, which refer to workload restrictions that apply. Additionally, OSHA references these standards in their regulations. Equipment weight limit restrictions for these devices are set at a maximum of 300 pounds. To ensure compliance with these regulations and to meet the qualifications required to perform their jobs, employees need to make sure their body weight, plus any tools they carry with them, does not exceed the 300 pound limit.

The Employer's program involves determining the acceptable body weight for employees after deducting the weight for the tools that they carry. In the Grievant's case, his maximum body weight was determined to be 285 pounds after deducting 15 pounds for his tools. Management meets with employees who are at risk of exceeding the maximum limit. The reasons for the limit are explained. The employee is evaluated by his or her physician for the purpose of determining the amount of weight that the employee can reasonably lose per week, or per month under a supervised program. An agreement is reached between management, the physician and the employee. The

employee is monitored under the program for purposes of losing the excess weight, and the employee is expected to maintain his or her required weight so as not to exceed the maximum limit. Failure to "successfully meet [managements] expectations could result in disciplinary action, demotion or termination." "Progressive disciplinary action should result if the employee continuously fails to meet the clearly defined expectations. Where to draw the line in this area should be determined by supervision, in conjunction with Employee Relations and Medical." The Employer formalized the program by issuing a Safety & Body Weight Bulletin: Seven Steps to a Safer Workplace on February 6, 2003. The seven steps are: (1) establishing a safe body weight; (2) compliance and training methodology; (3) physician evaluation; (4) communication to the employee; (5) weight loss monitoring; (6) post-compliance period; and (7) an annual compliance check.

The particulars surrounding the Grievant's compliance are as follows: The Grievant's weight on January 31, 2001 was 340 pounds. He was placed on a medically supervised weight reduction plan providing for a four-pound reduction per month. His weight was monitored for progress and he was placed on restricted duty until he met the compliance standard. He was weighed each month. His weight generally declined over the period, but he gained weight during some months. By July 2, 2002, his weight was 283.6 and he complied with the requirement. He exceeded the limit again on August 1st, but he was weighed again on August 7th and was below the limit. He exceeded the limit again when he was weighed at various times from October 2002 through March 2003, but his weight was steadily declining. By March 21, 2003, he was in compliance at 284.8 pounds. He stayed in compliance until June 20, 2003 when he weighed 293.3 pounds.

The Grievant was required to be weighed on a bi-weekly basis, and this schedule was to remain for a six-months period after July 9, 2003. The schedule would be reduced if he adhered to the 285-pound limit during the period. He was advised on June 23rd that the Employer's "tolerance of [his] continued violations of the maximum weight limitation and safety issue has been exhausted" and that a discharge would be considered for future violations of the policy. The Grievant achieved compliance by July 9th, but he was advised that his failure to comply in the future would result in the termination of his employment.

The Grievant was counseled again on September 16th after his weigh-in on September 4th at 288 pounds. On December 1st, the Employer recognized the Grievant's continuous efforts to lose weight when he weighed in at 285.7 pounds on November 14th. Nevertheless, after giving him additional consideration, he was told that future violations of any amount would be unacceptable. He was given a five-day suspension and was told that he would be discharged on December 15th if his weight exceeded 285 by any amount. The post-compliance period was extended through June 1, 2004.

III. Contract Provisions.

ARTICLE I

¹ The five-day suspension was initially without pay, but was reduced to an "in-house" suspension with pay after meeting with the Union over a probable grievance. The parties agreed that no grievance would be filed if the suspension did not include loss of pay. However, the Union accepted the Employer's measures in attempting to bring the Grievant into compliance with the Seven Steps policy, and the Union recognized that the Grievant was out of compliance with the policy at various times. The Union, however, reserved its right to challenge policy's application and the reasonableness of the policy's administration.

Section 9. (a) Except where expressly abridged by a specific provision of this Agreement, the Union recognizes that the management of the Company, the direction of the working forces, the determination of the number of men it will employ or retain in each classification, and the right to . . . suspend, discharge, discipline . . . demote or transfer, and to release employees because of lack of work or for other proper and legitimate reasons are vested in and reserved to the Company.
* * *

(c) The Company may adopt or revise any work methods and procedures which are not in direct conflict with the provisions of this Agreement. The Company will notify the Union, in writing, of any new or revised Company work methods and procedures. Such new or revised Company work methods and procedures shall not be effective until such notice is given.

ARTICLE V

SECTION 22. (a) The Company shall furnish the employees with the proper safety devices as required by the Company for protection of life and property in the performance of their duties. The employees shall at all times use every means for the preservation of such safety appliances and shall use them when necessary.

IV. The Parties' Positions, Evidence and Findings.

The Reasonableness of the February 14, 2000 Safety Bulletin

Employer promulgated rules or policies, including those related to employee safety, are subject to arbitral review under the "rule of reason." The imposition of such rules by management must satisfy an analysis that the rule is related to its stated objective, and that it is consistently applied to members of the workforce.² The rule will be struck down if it is arbitrary (without a rational basis), capricious (imposed in bad faith), discriminatory or unreasonable. These principles apply to the rule as stated, or to

² The Common Law of the Workplace, The Views of Arbitrators, 2nd Ed., NAA, Theodore J. St. Antoine, Editor, BNA, Section 8.7 and 8.8, pp. 308-310 (2005).

the manner in which it is applied to the workforce. When it comes to safety and health issues, arbitrators provide management with considerable discretion.³

Section 22 specifically provides for managerial discretion in this area. The Employer must furnish proper safety devices, but management is authorized to determine what is required. Harnesses are clearly safety devices. Ladders, aerial lifts and platforms are not technically "safety devices," but the government standards for their usage fall under this umbrella. Accordingly, the Employer has the contractual discretion to decide the type and quantity of tools and equipment it wishes to utilize.

The Union argues that the Employer's choice of equipment for usage in this case is unreasonable. It has chosen to use ladders with a 300-pound limit in the Energy Delivery Business, when other departments use 350-pound ladders. The Employer could easily purchase a 350-pound ladder for the Grievant to use at a minimal cost. But, there was no evidence that the Employer's selection of ladders and other equipment was outside of the standard used in the construction industry.⁴ The ladders come in various types and sizes, and are not the only equipment used by employees in Energy Delivery. Other equipment consists of aerial lifts that provide for a maximum weight of 500 pounds for two persons, and harnesses that have certain weight restrictions for usage. It is unreasonable to require the Employer to purchase and supply the Grievant with all of this

³ Id. at 309.

⁴ The Union argues that it would be unreasonable for the Employer to use 160 pound ladders purchased at K-Mart. (Brief, p.100). This may be true because many employees would exceed the standard. However, a 285 weight for a 300-pound ladder was not shown to be unreasonable for most employees in the workforce.

specialized equipment to accommodate his unique requirements.⁵ This solution is more complicated and more expensive than the Union's simplified proposal of supplying the Grievant with a few specialized ladders.⁶

Reassignment of Duties to Avoid Use of Equipment

The Union argues that the Employer may easily circumvent the policy as it applies to the Grievant. The Grievant has special skills that involve work on the ground. He has only been required to use a ladder or safety harness one or two times in ten years. When he was placed on restrictive duty because of his weight, his actual job assignments did not change. It is unlikely, as a practical matter, that his safety will ever be compromised because he does not use the equipment that cannot accommodate his weight.

The Employer responds that much of the time the Grievant was performing work on the ground was due to his being placed on restrictive duty because of his weight. He could not be assigned other work because of his limitations. The Grievant's job description requires the use of this equipment for many of the assignments. A senior

⁵ The Employer further argues that no CBA language requires it to provide the Grievant with special equipment in order to accommodate his body weight. Even under ADA law, which is not a part of this grievance (there is no claim of a disability), courts have held that employers are not required to accommodate one's disability by eliminating essential job functions. Hummel v. County of Saginaw, 2002 U.S. App. LEXIS 14684 (6th Cir.). Even if an employer permits a job to be restructured on a temporary basis, it is not obligated to do so permanently. Scanlon v. Boeing, 2002 U.S. App. LEXIS 21126 (6th Cir.) (Employer could require employee to climb ladders despite excusing employee from such work over time as an accommodation.)

⁶ The department uses approximately 100 ladders of different sizes. They are assigned to specific areas, not to employees. Lift trucks are leased from a supplier and are not owned by the Employer. Higher weight limit trucks are not available. Tr. 123.

construction electrician may spend up to one-third of his time on a ladder or aerial lift. The Employer maintains that the Grievant would have been required to use this equipment if he was able to meet his weight requirements.

The Grievant was primarily engaged in the job of installing internal wiring into buildings. This assignment is a desired job because the work is performed inside and is less physically demanding than other work. The Grievant should not be permitted to default into this desirable work on a permanent basis because of his inability to meet the weight requirements for doing other work. This would unfairly penalize other employees who are able to comply, but do not receive the opportunity to perform the more favorable assignments.

Moreover, the Employer argues that it may need the Grievant's services on a temporary basis or for emergencies. He must be fit to perform assignments that are in his job description when these circumstances apply. The Grievant's department is normally involved with new substation construction, but from time to time services are needed for repairs when tornadoes and other casualties damage the substations. A Senior Construction employee in the Electric System Operations Department must be able to perform all of the duties within the job description.

Notwithstanding that the Grievant has not been called upon in the past to perform temporary or emergency assignments that require his use of the subject equipment,

"Murphy's Law" may ultimately prevail.⁷ If the Grievant is required to perform this necessary work at his last recorded weight the equipment could fail and he could be injured. The Employer would be exposed to an OSHA violation and a worker's compensation claim at a minimum, and possibly additional liability claims and litigation expenses.⁸

I find that the Union has not met its burden of establishing by a preponderance of the evidence that the Employer's policy is arbitrary, discriminatory or unreasonable on its face, or that it was applied against the Grievant in such a manner. The safety concerns for the use of the equipment provide a rational basis for the implementation of the policy. The Union's proposed accommodations for exempting the Grievant from the policy are problematic and unworkable for the above stated reasons. The Grievant failed to consistently maintain his weight under the policy limit after the Employer expended considerable time and effort providing the Grievant with assistance, deferrals and extensions. He is one of those persons who cannot maintain a body weight below 285 pounds on a consistent basis, notwithstanding his repeated efforts to comply with the policy. He does not have a medical disability; he is otherwise fit to perform other work, but he is unable to perform all of the necessary functions of this job.⁹

⁷ The essence of "Murphy's Law" is that if something can go wrong, it will.

⁸ It is this arbitrator's understanding that employees cannot waive their rights to worker's compensation beforehand. They may only choose on a case-by-case basis not to file a claim.

⁹ His last recorded weight in September 2005 was 343 pounds, 58 pounds above the 285-pound limit for 300-pound ladders, and 8 pounds above the limit for use of a 350-pound ladder (343 pounds versus 335 pounds). Use of an aerial lift with another employee would require the other employee to weigh 127 pounds to meet the equipment limit (500

The Severity of the Penalty

The principle of "just cause" requires a review of the penalty as well as a determination of the alleged rule or policy violation. The discipline must not be too severe under the existing facts and circumstances.¹⁰ Mitigating factors should be considered such as the employee's prior work record, seniority, and the minimal harm or damage caused to the employer.¹¹

There are a number of positive mitigating factors in the Grievant's favor. He is a long-term employee with a good work record. He was hired in 1986 when he weighed 262 pounds, long before the imposition of the Safety Program. He engaged in no misconduct. He attempted to comply with the weight restrictions by following the Company's procedures. He received medical care, went to a nutritionist, and participated in fitness programs to lose weight. Nevertheless, he was unable to consistently maintain his weight below the requirement for using the equipment in his department. Mr. Hoppenjans, the Company's Labor Relations Consultant testified as to the Company's thought processes:

A. We were just trying to get [the Grievant] to comply. We weren't trying to be punitive in any way. We wanted him to be fully productive and hopefully not deal with it in the future. (Tr. 57)

pounds less 30 pounds of tools for two employees or 470 pounds less the Grievant's 343 pounds).

¹⁰ Timken Co. v. Steelworkers, 85 LRRM 2532 (6th Cir. 1974); Macomber, Inc. 74-2 ARB Para. 8397, p. 4511 (Miller); Tampa Transit Lines, Inc., 63-2 ARB Para. 8432 (King); Gray Drug Stores, Inc., 53 LA 1329 (1969).

¹¹ Common Law, at Section 6.2, p. 172.

It is clear from the Company's actions over the five-year period during which the Grievant attempted to comply with the weight restriction that it would have preferred to retain the Grievant as a valuable employee. Management particularly recognized his wiring skills and expertise. The question remains as to whether some lesser form of discipline was justified under these facts and circumstances.

The December 18, 2001 correspondence to the Grievant from supervisors Marks and Golsch states: "[Y]ou were informed that failure to meet expectations outlined will result in either your demotion to a job for which you may qualify if available, a transfer to another job for which you may qualify if available or, in the absence of either above, termination of your employment." The evidence is unclear as to the reason for the Employer's decision to terminate the Grievant's employment instead of the other mentioned disciplinary options. There is no position in the department to which the Grievant may be transferred or demoted - all positions have the same restrictions.¹² However, the record does not contain the Employer's thought processes regarding an involuntary transfer of the type mentioned in the December 18th correspondence. Mr. Isaack testified only about voluntary transfer requests initiated by employees.¹³

AA
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WM
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Employees Riddle, Tolbert and McQueary could not meet the weight restrictions in the Substation Construction Department, but were provided with the options mentioned in the December 18 correspondence. Riddle was demoted to a managerial

¹² Testimony of Keith Isaack, Manager of Substations, Tr. 124.

¹³ Tr. 124-25.

position for which he was qualified.¹⁴ Tolbert was transferred to a position outside of the substation construction area.¹⁵ McQueary was a long-term employee with over 30 years of service. He was permitted to remain in the department until he retired.¹⁶ The Employer argues that the evidence in these circumstances falls short of proving that the Grievant was a victim of disparate treatment. Nevertheless, one must question why the Employer, based upon the above mitigating factors favoring the retention of the Grievant, who was described in the record as a valuable employee with a good work record, did not consider and apply these other options.

V. Award.

The grievance is sustained in part. The Grievant shall be reinstated as an employee on a long-term leave of absence without pay from the date of his termination. The Grievant shall remain in that status until he fills a vacant position for which he is qualified that contains no body weight restriction, or until August 1, 2008, whichever is later.

The Employer shall offer the Grievant the opportunity to fill a vacant position for which the Grievant is qualified that is either comparable to the Grievant's former position in terms of pay and compensation, or a position that is less comparable, and Grievant shall have the option to accept the transfer or reject it until August 1, 2008.

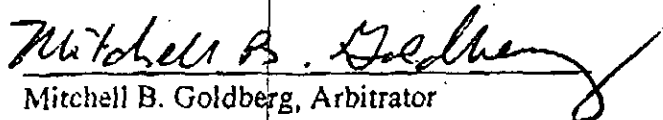
¹⁴ Tr. 91.

¹⁵ Id.

¹⁶ Tr. 91-92.

The Grievant shall retain his seniority. However, until the Grievant accepts the transfer into the vacant position he may remain employed elsewhere. If the Grievant is unemployed during the interim, the Employer shall provide the Grievant with medical and health insurance coverage (family or single). If the Grievant is employed elsewhere he shall provide for health and medical insurance coverage at his expense. If the Grievant does not exercise his option to fill a vacant position for which he is qualified by August 1, 2008, the Employer may remove him from the employment rolls, and the Grievant's seniority shall be terminated.

Date of Award: July 13, 2007


Mitchell B. Goldberg, Arbitrator



Print - Close Window

Date: Thu, 3 Jan 2008 22:17:12 -0500 (EST)
From: "HR Staffing Services" <DO-NOT-REPLY@duke-energy.com>
To: "Louis Selkirk" <louist41@yahoo.com>
Subject: Duke Energy - Performance Tech

In recent days we have decided to re-evaluate our plans for staffing the Performance Tech position and after thoughtful deliberations the decision has been reached to cancel this opening and to repost at a lower level - Asst Performance Tech.

If you would like to be considered for the Asst Performance Tech position, please take the time to apply on-line.

Thank you,

HR Staffing Services

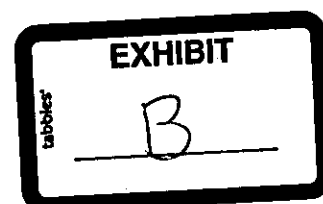
HTML Attachment

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If you would like to be considered for the Asst Performance Tech position, please take the time to apply on-line.

Thank you,

HR Staffing Services



Laboratory Helper – 101853

Job Description

[Apply Online](#)

[Apply Online](#)

Description

Depending upon the desired qualifications of the successful candidate, the hiring manager may elect to fill this position at a higher level within the job hierarchy.

Under close supervision, assists employees of higher or similar classifications in routine laboratory work; in the installation, maintenance and repair of laboratory equipment; in the testing of power plant equipment or operations; and under directive supervision, performs such duties as:

Taking and recording readings from instruments and gauges of equipment.

Cleaning instrument faces and instrument panels, laboratory room tables and work benches.

Cleaning and adjusting pens on recording instruments and making necessary chart changes.

Processing coal samples.

Cleaning Chemical Injection skids and surrounding area.

Cleaning and handling laboratory glassware.

Collecting ash and oil samples from various places in the station.

Collecting boiler water, demineralized water and other water samples and condensate samples for routine analyses.

Analyzing samples of water.

Inspect instruments and reporting faulty operations.

Adding chemicals by hand or with chemical feed pumps.

Handling and maneuvering high-pressure gas bottles, such as: acetylene, oxygen, etc.

Attending and satisfactorily completing Company sponsored courses before the end of six months in this classification, such as Basic Power Plant Course and Basic Chemistry courses. Maintaining high level of completing the Laboratory Section Helper job checklist within the first six months from employee's classification date. Performing other similar or less skilled duties as required by supervision.

Qualifications

Basic Qualifications:

High School diploma or equivalent.

Must have a valid driver's license and the ability to operate automotive equipment safely.

Specific Requirements:

Must meet the Company's requirements as to General Qualifications; and, in addition:

Must have satisfactorily completed courses in physics and chemistry, at the high school level, and must be continuing education beyond the high school level as outlined by the Department Manager. Must be able to climb and work from a ladder. Must possess a good faculty of observation. Must have some familiarity with materials used in the laboratory and small tools needed for various types of instrument repair work.

Must demonstrate on a regular basis, through the medium of tests, the ability to perform the duties of this job classification. Must be willing to satisfy the guidelines as set forth by the Department Manager as to course studies to continue in this classification. Must be able to distinguish the various indicator colors used in chemical test work.

EXHIBIT

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Desired Qualifications:

Two-year degree in Electrical Engineering Technology preferred.

Job experience including electrical and mechanical maintenance or testing experience preferred.

Profile

Job Field Operations
Locations Ohio-North Bend-DE of Ohio-MiamIFtGenStn (EG376)
Organization MIFt Production
Schedule Full-time

Additional Information

Posting Date Jan 21, 2008, 11:02 PM, (UTC -5:00)
Unposting Date Jan 29, 2008, 11:59 PM, (UTC -5:00)
Contact Name Alexander, Iris J
Contact Email ljalexander@dukeenergy.com
Hiring Manager Whitaker, Gregory W

Compensation and Benefits

Minimum salary 0.00 USD
Pay Basis Hourly

Represented/Union Position Yes



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Dear Louis,

Thank you for interviewing and expressing your interest in the Laboratory Helper position. At this time, we have decided to pursue other candidates whose experience and qualifications more closely align with the specific needs for this position.

We appreciate your interest and commitment to Duke Energy, and we wish you success in your career here. We encourage you to stay abreast of job opportunities posted on the Job Opportunities site on the Employee Portal. If you are interested in applying for other positions, please follow the directions to submit your application.

Feel free to contact Teresa D Weichold at 513/419-5922 or via email Teresa.Weichold@Cinergy.com should you have any questions or concerns. Again, thank you for your interest in this position.

Duke Energy is an equal opportunity employer.

Sincerely,

Staffing Services
Human Resources
Duke Energy Corporation